ifornia trial court, the Rehabilitation and Reinsurance Agreement accords to all life policies, even those carrying disability features, 100 per cent of insurance in the New Company and to disability policies the various percentages shown at page 132 of the Record, and we add all of the percentages together, we get 410, and when we divide that by 7 the aggregate of the different number of percentages, we get practically sixty per cent as the amount which every policyholder would receive in insurance in the New Company on a pro rata basis. It results, that when petitioner's policy is reduced to twenty per cent in order that other policies shall receive 100 per cent or ninety per cent petitioner's policy is impaired for the benefit of other policies receiving percentages in excess of twenty.

Petitioner's policy is Number 4619175 and falls within the twenty per cent class, and had petitioner been accorded sixty per cent of insurance in the New Company, he would have a policy entitling him to a disability benefit of $300 per month instead of $100 per month, which is allotted to him on the twenty per cent basis.

We seriously doubt if in the hearing of *Neblett* v. *Carpenter,* this viewpoint was presented to Your Honors for your consideration, and we confidently believe that had it been Your Honors would have adopted the view that the obligation of petitioner's contract had been impaired. Of course, we appreciate that it was not to the interest of Neblett, a life policyholder, or any disability policyholders accorded in excess of sixty per cent of insurance in the New Company that they possessed in the Old, to present to this Court a situation that would mean that they, along with all other policyholders, petitioner included, should be put on a pro rata liquidation basis as they were in the Old Company and receive sixty per cent of insurance in the New Company.

It will be noted, however, that the one life policy and the three disability policies all make the same argument in *Neblett* v. *Carpenter,* 305 U. S. 297, indicating that their interests and purposes are substantially identical, whatever those interests and purposes may be.

We submit that not only do the California proceedings impair the obligation of petitioner's policy contract, but they also deny to petitioner the equal protection of the law, a proposition that was not presented to Your Honors in the *Neblett* case so far as we can glean from your opinion therein.

All types of policies were given an opportunity to file a claim for such damages as they might contend to be due to them on account of the provisions of the Rehabilitation and Reinsurance Agreement being given effect. So far they were accorded equal protection of the law, but there the equal protection ceases, and we have a new situation presenting only the question of the amount of insurance in the New Company that shall be given to each policyholder.

When every policyholder in the Old Company has an equal right with every other policyholder, to have the amount coming due under the terms of his policy paid in full or to such an extent as the assets of the Company would extend when applied pro rata to all policies, and then by the Agreement in question one policyholder, who has a disability policy coupled with a life feature, receives 100 per cent, of insurance in the New Company and your petitioner, whose policy covers a disability feature only, is accorded but twenty per cent, we submit that there is no escaping the conclusion that petitioner has been denied the equal protection of the law.

In *Larson* v. *Pacific Mutual Life Insurance Company,* 373 Ill. the Court, at page 321, says:

> "On this appeal plaintiffs say the questions presented and decided by the Supreme Court of California and the Supreme Court of the United States in reference to the due process and contract clauses of the Federal constitution are not binding on them. The theory advanced is that since the plaintiffs were not personally served and did not appear in the court of California, that court was without jurisdiction over them. In reply it is contended that the doctrine of class representation applies. As noted, several of the intervenors in the court proceedings in California were holders of non-can policies identical, as to rights, with plaintiffs' policies."

This assertion omits to note the controlling factor that in this court and in the California Supreme Court the equality of rights among all policyholders which pertained before the hearing in the trial court was there changed to numerous and varying inequalities, ranging from 100 per cent, for life policies both with and without disability features, to as low as 20 per cent for some disability policies as appears from the record (p. 132).

We submit that the mere fact that some disability policyholder had intervened in the California proceedings would by no means make those proceedings in any sense a class suit. For example, if those disability non-can policyholders who intervened held policies of the ninety per cent type shown at page 132 of the Record, they would gain a very material advantage by having other disability policies cut down to twenty per cent so far as the insurance in the New Company is concerned. A reduction of these policies from 100 per cent to twenty per cent would be a vast benefit to the ninety per cent type at the expense of the twenty per cent type.

If the New Company were to have been liquidated

at the time the Insurance Commissioner filed his petition in the California court, as elsewhere indicated and on the basis of figures embodied in the Rehabilitation and Reinsurance Agreement (Rec. 132) each policyholder would receive sixty per cent, but if that same liquidation were to take place upon the basis of the percentages involved in the Rehabilitation and Reinsurance Agreement, all persons who took out disability policies in 1932 and thereafter would receive ninety per cent or thirty per cent more than they would have received on a pro rata basis. It results that this last mentioned class of policyholders would earnestly desire that the Rehabilitation and Reinsurance Agreement be sustained.

In short, any disability policyholder receiving more than sixty per cent in the New Company would be advantaged by said Agreement, and even those who received fifty-five per cent, forty-five per cent or thirty-five per cent would gain financially by having the insurance of petitioner and those in like position reduced to twenty per cent.

We therefore respectfully submit that there could be no class representation in the California proceedings, whether in the trial court, the California Supreme Court or in this court in *Neblett* v. *Carpenter,* unless the non-can disability policyholders appearing were by the Rehabilitation and Reinsurance Agreement put in the twenty per cent class.

Respondent has invoked the class representation theory and before it can expect to have this court apply it, it must show that the non-can policyholders appearing before Your Honors in *Neblett* v. *Carpenter,* were policyholders placed by the Rehabilitation and Reinsurance Agreement in the twenty per cent class.

This subject is discussed in *Commercial Publishing*

Company v. *Beckwith,* 188 U. S. 567, where Your Honors at page 573, say:

> "It is to be borne in mind that upon plaintiff in error rested the burden of establishing that the decrees of sale were not given the due effect to which they were entitled, and if it has failed to sustain such burden this court cannot say that error was committed by the judgment below rendered."

Then, in speaking of a certain decree involved, at page 576, you say:

> "Beckwith nowhere appears to have been an active participant in obtaining such decree or assenting thereto. It does not even appear that at the time of the entry of the decree he was a party to any of the actions which had been consolidated, for it cannot in reason be inferred from the mere circumstance that nearly two years after, on the entry of the final decree he is referred to therein as being a cross-complainant in one of the actions seeking to enforce a lien the nature of which was not disclosed."

It nowhere and in no way appears that of the several policyholders appearing in the California proceedings as indicated at pages 50 to 52 inclusive of the record, any thereof held a policy which, by the terms of the Rehabilitation and Reinsurance Agreement, was reduced to twenty per cent in New Company insurance based upon the insurance called for by his old policy.

It does not appear that the owners of any policies appearing in the California proceedings held Minnesota contracts embodying therein the law of Minnesota to the effect that no change should be made in the policy without the assent of the insured.

It does not appear that any of the policyholders appearing in the California proceedings were so disabled physically as to be unable to obtain new insurance in any other Company.

It does not appear that any policyholders appearing in the California proceedings did not in fact receive notice of the pendency of said proceedings provided by court order to be mailed to policyholders.

It does appear (Rec. 2) that petitioner holds a Minnesota policy.

It does appear (Rec. 183) that petitioner is so disabled physically as to be unable to procure new insurance in another company.

It does appear that petitioner did not in fact receive the notice provided by court order to be mailed to all policyholders (Rec. 162).

At page 10 counsel cite *Hartford Life Insurance Company* v. *Ibs,* 237 U. S. 662; *Hartford Life Insurance Company* v. *Barber,* 245 U. S. 146, and *Royal Arcanum* v. *Green,* 237 U. S. 531, as sustaining their contention that petitioner is bound by the California proceedings upon the theory of class suit.

The first of these cases involves the right of the Company to make assessments to increase a mortuary fund perpetuated to pay death claims. It appears there that all of the certificate holders were identically situated and stood on the same plane. There was no chance for conflicting interests as between them because none was advantaged to the detriment of another. There is no room for an argument that a number of certificate holders could not speak for others as well as themselves.

The second case was substantially identical with the first.

The third case is different from the other two in that under the statute pursuant to which the Royal Arcanum was organized, the corporation was made the representative of all its members, and the court very

naturally holds that its members were bound in proceedings to which the corporate entity was a party.

In the case here presented however as we elsewhere point out, the fact that one is a policyholder does not have any bearing upon his rights and interests being identical with another policyholder as such, but numerous classes are involved. It might well be said that in the California proceedings a life policyholder or a number of them could stand as representatives of the class of life policyholders.

When it comes however to non-cancellable disability policyholders, the Rehabilitation and Reinsurance Agreement places them upon so many different planes that a disability policyholder cannot be said to be representative of all other disability policyholders, because of the radical differences in their situation and in their rights.

It might well be, all other questions aside that a non-cancellable disability policyholder who is accorded a policy in the New Company for twenty per cent of the amount of the old policy held by him, could be said to speak for other members of that class, but certainly a non-cancellable disability policyholder receiving insurance in the New Company for ninety per cent of his Old Company insurance could not by any means be said to be upon the same plane as the twenty per cent policyholder.

In short, the cases cited by counsel portray an equality of interest as to all certificate holders but the California proceedings involving the Rehabilitation and Reinsurance Agreement and the approval thereof, clearly establish such marked diversity of interests that no random number of any policyholders described as holding life policies or non-cancellable disability policies, could in anywise be said to have identity of interests

with all policyholders. Clearly respondent did not make a record disclosing identity of interests as between any of those appearing in the court proceedings and petitioner in this case, and in the absence of such showing the California proceedings are not entitled to full faith and credit upon any theory of the case. However, if we are right, as we are convinced we are in our contention that a proceeding to fix the liability upon a policy of each individual member is a proceeding in *personam* requiring personal service, leaving such proceedings lacking in jurisdiction, but even if a proceeding *in rem*, the *res* was not present in California and the proceedings were without jurisdiction for that reason.

It is so glaringly apparent as not to admit of argument that if the Old Company was insolvent, and if all policyholders were dealt with on a pro rata basis, none of them would receive 100 per cent. It results that the procedure adopted by the Rehabilitation and Reinsurance Agreement is to take from non-cancellable disability policies varying percentages of what they would receive if they were put on a pro rata basis with all other policies, and add to what the life policies would receive if all were treated alike, so that with such addition the favored life policies which, to a great extent are also disability policies, will receive 100 per cent, in the New Company as against twenty per cent which will be received by petitioner.

At page 302 of your opinion in *Neblett* v. *Carpenter*, 305 U. S. 297, you take note of a number of questions raised before you which were essentially state questions and over which you consequently had no jurisdiction. The portion of the opinion which distinctly bears upon the record here presented is found at page 303, where you say:

> "The petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation

adopted by the Commissioner and approved by the Court, even if authorized by the Insurance Code, denies them due process and impairs the obligation of their policy contracts. Because of these contentions, we granted certiorari."

It is to be noted, however, that the equal protection of the law provision of the Federal Constitution was not invoked and this court was given no opportunity to rule thereon or on the proposition here presented that the police power of California is subject to the applicable provisions of the Federal Constitution. The life policies were granted the option to accept 100 per cent of insurance in the New Company or file claims with the Liquidator of the Old Company, and that was true as to policies which also carry along with the life feature the identical features that the policy of petitioner embodies.

When it comes to the option that is accorded to petitioner, his option is not to receive 100 per cent of insurance in the New Company or file a claim, but to receive only twenty per cent or file a claim. Certainly, it cannot be seriously contended that petitioner received the same protection by the proceedings in question as do the life policies. In order to receive equal protection he should have been given an option to take 100 per cent of insurance in the New Company or file a claim.

In a measure the same proposition applies as between petitioner's policy which may obtain only twenty per cent of new insurance and other disability policies which may obtain varying amounts in excess of twenty per cent ranging as high as ninety per cent. The principle is the same as in the case of the life policy, but the degree of lack of equal protection varies.

The Old Company policy accorded to all types of insurance 100 per cent and thereby accorded to all policies, including the disability policies now only receiving twenty per cent the same or equal protection of the law accorded to all others.

At page 304 of your opinion, in *Neblett* v. *Carpenter*, 305 U. S. 297, you say:

> "The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the state law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree. On account of the state of the record the petitioners are unable to point to any evidence to sustain their contention that if they dissent they will not receive as much in liquidation of their claims for breach of their policy contracts as they would upon a sale of assets and distribution of the proceeds."

Petitioner is not here insisting that he was entitled to liquidation. He is, however, insisting that he is entitled to the equal protection of the law, and that if certain policies receive 100 per cent or fifty-five per cent or sixty-five per cent (Rec. 132), it stands to reason and requires no evidence outside of the Rehabilitation and Reinsurance Agreement itself to establish the fact that had all policies received their pro rata share of the old company assets in the form of new company insurance, petitioner would have received about sixty per cent of new insurance.

If we are to take the life policies and petitioner's policy alone to illustrate the thought which we desire to press upon the attention of the court, and if we were to take the 100 per cent, accorded the life policies, and the twenty per cent accorded petitioner under his disability policy and add them together and divide them by two, we would get sixty per cent as the amount which petitioner would receive were he accorded the equal protection of the law guaranteed to him by the Federal Constitution, and the life policies would receive the

same amount, and in consequence thereof, both would receive the equal protection of the law.

At page 305 of your opinion you say,

> "It is not contended that a statutory scheme for the liquidation of an insolvent domestic corporation is *per se* an impairment of the obligation of the company's contracts. The argument is that the impairment of contract arises from the less favorable terms and conditions of the new noncancelable policies which are to be substituted for the old ones and, in the case of the life policies, by the substitution of a new company as contractor in place of the old, without the consent of the policyholder."

By the terms of the Old Company policies they were all treated alike. None was given a greater percentage of what his contract called for, than any other. The agreement complained of takes from certain policies and adds that to the pro rata which other policies were entitled to on the basis of an equal division of assets, to which all policies were entitled to by their terms and by law.

We make no contention that the life policyholder was compelled to accept new insurance. He, like petitioner might file his claim with the liquidator. No fault is found on account of taking new insurance in the New Company. It is the amount of such insurance accorded to petitioner, compared to that that is accorded to others of which the complaint is made.

As one of the reasons why due faith and credit should not be given to the California proceedings, we raise the point that those proceedings violated the Federal Constitution because the California decision was based solely upon the exercise by the State of its police power, as is evidenced by what the California Court said in *Carpenter* v. *Pacific Mutual Life Insurance Company,* 10 Cal. (2d) 307, at 331, as follows:

"The Old Company was powerless to change the existing non-can policy. The contract and due process clauses prohibited the Company from making any changes therein but these prohibitions do not apply to the state acting under its police powers."

This Court held to the contrary in *Harris Power Association* v. *Commission,* 294 U. S. 523, and in numerous other cases, thereby debarring the California proceedings from the provisions of the due faith and credit provisions of the Federal Constitution. This question was not presented in *Neblett* v. *Carpenter.*

For the several reasons herein and in our original brief suggested, we again respectfully submit that this court should order the writ of certiorari to issue, and thereupon review and reverse the proceedings of the Illinois Courts.

Respectfully submitted,

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